

Daniel J. Gibbons, WSBA No. 33036  
Steven J. Dixson, WSBA No. 38101  
**WITHERSPOON • KELLEY**  
422 W. Riverside Avenue, Suite 1100  
Spokane, WA 99201-0300  
Phone: (509) 624-5265  
Fax: (509) 458-2728  
[djg@witherspoonkelley.com](mailto:djg@witherspoonkelley.com)  
[sjd@witherspoonkelley.com](mailto:sjd@witherspoonkelley.com)

## Hon. Benjamin H. Settle

*Attorneys for Defendant the Bank  
New York Mellon, f/k/a the Bank  
of New York as Trustee for First  
Horizon Alternative Mortgage  
Securities Trust 2006-AA6 and  
Nationstar Mortgage LLC d/b/a  
Mr. Cooper*

**UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON (TACOMA)**

SCOTT TOWNSEND and DEBORAH  
TOWNSEND, husband and wife,

## Plaintiffs.

vs.  
THE BANK OF NEW YORK  
MELLON, f/k/a THE BANK OF NEW  
YORK AS TRUSTEE FOR FIRST  
HORIZON ALTERNATIVE  
MORTGAGE SECURITIES TRUST  
2006-AA6; MR. COOPER f/k/a  
NATIONSTAR MORTGAGE, LLC

## Defendants.

NO. 3:20-cv-05397-BHS

**DEFENDANTS' SECOND MOTION  
TO DISMISS OR TO STAY  
PROCEEDINGS**

**NOTE ON MOTION CALENDAR:  
AUGUST 28, 2020**

DEFENDANTS' SECOND MOTION TO  
DISMISS OR TO STAY PROCEEDINGS - 1  
S2062432



## WITHERSPOON-KELLEY

Attorneys & Counselors

422 W. Riverside Avenue, Suite 1100  
Spokane, Washington 99201-0300

Phone: 509.624.5265  
Fax: 509.458.2728

1           Defendants the Bank of New York Mellon f/k/a the Bank of New York as  
 2 Trustee for First Horizon Alternative Mortgage Securities Trust 2006-AA6  
 3 (**BoNYM**) and Nationstar Mortgage LLC (**Nationstar**), incorrectly sued as  
 4 Mr. Cooper f/k/a Nationstar Mortgage, LLC, move to stay or dismiss this action in  
 5 the interests of judicial efficiency and economy.

6           **I. SUMMARY OF ARGUMENT**

7           BoNYM filed its foreclosure suit in state court over a year before Deborah  
 8 and Scott Townsend filed this lawsuit. In response to BoNYM's foreclosure suit,  
 9 the Townsends contend it is barred by the applicable six-year statute of limitations  
 10 triggered by their discharge in bankruptcy in January 2010 and the bankruptcy  
 11 court's discharge order. They seek dismissal of the foreclosure suit with prejudice.  
 12 Relying on the same limitations and discharge theories, the Townsends filed this  
 13 action under the Fair Debt Collection Practices Act (**FDCPA**), 15 U.S.C. § 1692 *et*  
 14 *seq.*, and Washington Consumer Protection Act (**CPA**), RCWA § 19.86 *et seq.* The  
 15 *Colorado River* doctrine requires dismissal or stay of this lawsuit in favor of the  
 16 parallel state court proceeding. This case should be dismissed or stayed because  
 17 the state court first assumed jurisdiction over the property, piecemeal litigation  
 18 exists, the state action was filed first and has progressed further, the limitations  
 19 issue is better addressed in state court, the state court can adequately protect the  
 20 Townsends' federal rights, the Townsends engaged in forum shopping, and the state  
 21 action can resolve all issues in this proceeding. No factor weighs in favor of  
 22 allowing this action to proceed—it is exactly the wasteful litigation *Colorado River*  
 23 is designed to prevent.

24  
 25  
 26  
 27  
 DEFENDANTS' SECOND MOTION TO  
 DISMISS OR TO STAY PROCEEDINGS - 2  
 S2062432

 **WITHERSPOON•KELLEY**  
 Attorneys & Counselors

422 W. Riverside Avenue, Suite 1100  
 Spokane, Washington 99201-0300

Phone: 509.624.5265  
 Fax: 509.458.2728

1                   **II. RELEVANT FACTUAL BACKGROUND**

2                   **A. Prior Bankruptcy and Lawsuits**

3                   **1. Request for Judicial Notice**

4                   Pursuant to Federal Rule of Evidence 201(c), BoNYM and Nationstar  
 5 request the court take judicial notice of the cases and pleadings identified herein or  
 6 attached hereto.

7                   **2. 2009 Bankruptcy**

8                   This suit concerns the Townsends' mortgage loan. The Townsends filed for  
 9 chapter 7 bankruptcy protection on October 8, 2009 in the U.S. Bankruptcy Court  
 10 in the Western District of Washington.<sup>1</sup> Then creditor First Horizon Home Loans,  
 11 a division of First Tennessee Bank N.A., moved to lift the stay<sup>2</sup> which was granted  
 12 in December 2009.<sup>3</sup> Debtors were discharged in January 2010.<sup>4</sup>

13                   **3. 2012 Lawsuit**

14                   The Townsends filed a lawsuit against BoNYM (amongst others) in July  
 15 2012 which was removed to the U.S. District Court in the Western District of  
 16 Washington (Seattle) in August 2012.<sup>5</sup> The Townsends amended their complaint  
 17 in January of 2013.<sup>6</sup> In February of 2013, BoNYM, First Horizon, and MERs  
 18 moved to dismiss.<sup>7</sup> The Townsends dismissed their lawsuit soon after.<sup>8</sup> The court  
 19 dismissed the case with prejudice in March of 2013.<sup>9</sup>

20

---

21

22 <sup>1</sup> See Case 09-47534-PBS, doc 1.

23 <sup>2</sup> See Case 09-47534-PBS, doc 18.

24 <sup>3</sup> See Case 09-47534-PBS, doc 23.

25 <sup>4</sup> See Case 09-47534-PBS, doc 26.

26 <sup>5</sup> See Case 3:12-cv-05778-RBL, doc 1.

27 <sup>6</sup> See Case 3:12-cv-05778-RBL, doc 27.

<sup>7</sup> See Case 3:12-cv-05778-RBL, doc 28.

<sup>8</sup> See Case 3:12-cv-05778-RBL, doc 30.

<sup>9</sup> See Case 3:12-cv-05778-RBL, doc 31.

1           **4. 2013 Lawsuit**

2           The Townsends filed another lawsuit in November 2013 against Nationstar  
 3 which was removed to the U.S. District Court in the Western District of  
 4 Washington (Tacoma) in December 2013.<sup>10</sup> The Townsends amended their  
 5 complaint and the court later remanded the case to the Pierce County Superior  
 6 Court in February 2014.<sup>11</sup> The state court entered an order granting Nationstar's  
 7 summary judgment motion in September 2014. The case was later dismissed  
 8 without prejudice in February 2015.

9           **B. Pending Foreclosure Suit**

10          Due to the Townsends' default on their loan, BoNYM filed a complaint for  
 11 foreclosure on April 25, 2019 against the Townsends in the Pierce County Superior  
 12 Court as Cause No. 19-2-07409-0.<sup>12</sup> BoNYM first amended its complaint for  
 13 foreclosure on May 17, 2019.<sup>13</sup> The Townsends removed to the U.S. District Court  
 14 in the Western District of Washington (Tacoma) on July 24, 2019 claiming they  
 15 were previously discharged in bankruptcy in 2010 and limitations expired on  
 16 December 1, 2015.<sup>14</sup> They further claimed BoNYM is in violation of the  
 17 bankruptcy court's discharge order. *Id.* On August 6, 2019, BoNYM moved to  
 18 remand.<sup>15</sup> The court granted BoNYM's motion on September 10, 2019 finding the  
 19 Townsends' claims based on a statute of limitations, not 11 USC 524(a)(2).<sup>16</sup> The  
 20 Townsends answered the first amended complaint on or about February 11, 2020  
 21 in the pending foreclosure action.<sup>17</sup> As an affirmative defense, the Townsends

23          <sup>10</sup> See Case 3:13-cv-06052-RBL, doc 1.

24          <sup>11</sup> See Case 3:12-cv-05778-RBL, docs 17 and 18; Civil Case 13-2-14954-6.

25          <sup>12</sup> BoNYM's complaint is attached as **Exhibit 1**.

26          <sup>13</sup> BoNYM's first amended complaint is attached as **Exhibit 2**.

27          <sup>14</sup> See Case 3:19-cv-05678-RBL, doc 1.

28          <sup>15</sup> See Case 3:19-cv-05678-RBL, doc 8.

29          <sup>16</sup> See Case 3:19-cv-05678-RBL, doc 11.

30          <sup>17</sup> Townsends' answer is attached as **Exhibit 3**.

1 contend the foreclosure action is barred by the applicable statute of limitations  
 2 because their bankruptcy discharge in 2010 started the six-year limitations clock.  
 3 *Id.* They seek dismissal with prejudice, damages, costs, expenses, and attorney's  
 4 fees. *Id.*

5 **C. New Lawsuit**

6 The Townsends filed this lawsuit against BoNYM and Nationstar on April  
 7 28, 2020.<sup>18</sup> On June 1, 2020, they amended the complaint asserting violations of  
 8 the FDCPA and CPA.<sup>19</sup> Waivers of service were filed on June 22, 2020. Docket  
 9 Nos. 11 & 12. The Townsends claim they were discharged on January 13, 2010  
 10 and never reaffirmed the loan.<sup>20</sup> They allege the six-year limitations period to  
 11 enforce the deed of trust was triggered on January 1, 2010 and expired on January  
 12 1, 2016.<sup>21</sup> All of their claims against BoNYM and Nationstar rely on their  
 13 limitations and discharge theories.<sup>22</sup>

14 **III. ARGUMENTS & AUTHORITIES**

15 **A. Applicable Legal Standard**

16 *Colorado River Water Conserv. Dist v. United States*, 424 U.S. 800 (1976),  
 17 and its progeny provide a federal district court with discretion to stay or dismiss  
 18 the proceeding before it pending the resolution of a concurrent parallel state court  
 19 proceeding based on "considerations of wise judicial administration, giving regard  
 20 to conservation of judicial resources and comprehensive disposition of litigation."

21 *Montanore Minerals Corp. v. Bakie*, 867 F.3d 1160, 1165 (9th Cir. 2017). The

22  
 23  
 24 <sup>18</sup> See complaint ¶¶ 18-41, Docket No. 1.

25 Their amended complaint omits the quiet title claim they originally asserted. Compare  
 26 complaint ¶¶ 19-22, doc 1 with amended complaint, Docket No. 7.

27 <sup>20</sup> Amended complaint ¶ 19, Docket No. 7.

<sup>21</sup> *Id.* at ¶¶ 20, 52.

<sup>22</sup> *Id.* at ¶¶ 34, 41, 50-54, 60-61.

Court of Appeals recognizes the following eight factors in determining whether stay or dismissal is warranted under *Colorado River*:

- (1) which court first assumed jurisdiction over any property at stake;
- (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court.

*Id.* at 1166. These factors should not be applied mechanically; instead, a court should carefully balance "the important factors as they apply in a given case." *Id.* While the analysis begins with the scale "heavily weighted in favor of the exercise of jurisdiction," a court abuses its discretion if its failure to stay or dismiss an action contravenes *Colorado River*'s policy concerns. *See id.* at 1170–71.

#### B. Stay or Dismissal is Warranted Under *Colorado River*

##### 1. The State Court First Assumed Jurisdiction Over the Property

The first *Colorado River* factor addresses the concern that "parallel proceedings will result in inconsistent dispositions of [the same] property." *Id.* at 1166. It requires a stay where both actions are in rem or quasi in rem with respect to the same property and the state action was filed first. *See 40235 Wash. St. Corp. v. Lusardi*, 976 F.2d 587, 589 (9th Cir. 1992). It favors a stay even where one of the actions is not in rem or quasi in rem if the other is and the parallel proceedings present the risk of inconsistent dispositions as to a litigant's property interest. *See Montanore*, 867 F.3d at 1167.

The Pierce County Superior Court assumed jurisdiction over the property on April 25, 2019. This action was filed over a year later. In the state action, BoNYM seeks to foreclose its lien on the property through a foreclosure sale. The

1 Townsends assert BoNYM's claims are barred by the statute of limitations and the  
 2 bankruptcy court's discharge order. In this action, the Townsends base their  
 3 FDCPA and CPA claims on these same theories. While only the state action is in  
 4 rem, resolution of the Townsends' claims requires the court to determine the extent  
 5 to which BoNYM can enforce its interest in the property—the very question before  
 6 the state court. Because the nature of the Townsends' FDCPA and CPA claims  
 7 risks the two courts rendering inconsistent findings regarding BoNYM's property  
 8 interest, the first *Colorado River* factor weighs in favor of stay or dismissal.

9       **2. The Convenience of the Two Fora is Irrelevant**

10       The second *Colorado River* factor weighs in favor of deference where the  
 11 federal forum is sufficiently inconvenient. *Travelers Indem. Co. v. Madonna*, 914  
 12 F.2d 1364, 1368 (9th Cir. 1990). This factor is irrelevant because the Tacoma  
 13 Division is located just a few miles away from the Pierce County Superior Court.  
 14 *See Ala. Airlines, Inc. v. Schurke*, No. C11-0616JLR, 2013 WL 1898209, at \*8  
 15 (W.D. Wash. May 6, 2013) (finding the second factor to be irrelevant where both  
 16 fora were located in Washington).

17       **3. Avoiding Piecemeal Litigation Strongly Weighs in Favor of Stay**

18       "Piecemeal litigation occurs when different tribunals consider the same  
 19 issue, thereby duplicating efforts and possibly reaching different results." *Montanore*, 867 F.3d at 1167 (quoting *Am. Int'l Underwriters, (Phil.), Inc. v. Cont'l*  
 20 *Ins. Co.*, 843 F.2d 1253, 1258 (9th Cir. 1988)). The Supreme Court was most  
 21 concerned with this factor in *Colorado River*, see *United States v. Morros*, 268 F.3d  
 22 695, 706 (9th Cir. 2001), and it strongly weighs in favor of stay or dismissal here.

23       As it stands, the parties will be litigating the same core issues in both state  
 24 and federal court: whether limitations or the bankruptcy court's discharge order  
 25 precludes BoNYM from foreclosing on the property or collecting on the loan.

26  
 27 DEFENDANTS' SECOND MOTION TO  
 DISMISS OR TO STAY PROCEEDINGS - 7  
 S2062432

 **WITHERSPOON•KELLEY**  
 Attorneys & Counselors

422 W. Riverside Avenue, Suite 1100  
 Spokane, Washington 99201-0300

Phone: 509.624.5265  
 Fax: 509.458.2728

1 Should the court proceed, piecemeal litigation is not a mere possibility—it is  
 2 inevitable. By contrast, if the court stays or dismisses this proceeding, it will  
 3 alleviate the parties from duplicating their efforts and reduce the risk of inconsistent  
 4 findings as to the validity and enforceability of BoNYM's rights.

#### 5       **4. State Court Obtaining Jurisdiction First Favors Stay**

6       The fourth *Colorado River* factor considers which action was filed first and  
 7 the relative progress in each. *Montanore*, 867 F.3d at 1168; *Moses H. Cone Mem'l*  
 8 *Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 21 (1983). This action was filed one  
 9 year after BoNYM's state action. There has been considerable litigation in the state  
 10 action. The case was removed and remanded, BoNYM secured a default judgment  
 11 against some of the parties establishing the priority of its lien, the Townsends have  
 12 filed their answer and defenses, and the parties are engaging in written discovery.  
 13 By contrast, here, the parties have engaged in little motion practice and no  
 14 discovery.

#### 15      **5. Interplay of State and Federal law Renders Fifth Factor Neutral**

16      The fifth *Colorado River* factor may favor stay or dismissal when an action  
 17 raises questions of state law which are complex and better resolved by a state court.  
 18 *Montanore*, 867 F.3d at 1168. The central issues in both cases is the running of a  
 19 Washington statute of limitations. Each of the Townsends' claims, including their  
 20 federal claim, largely rests on their theory foreclosure on their property is time-  
 21 barred. The limitations issue is better resolved by the Pierce County Superior  
 22 Court, as it requires interpreting Washington law and ultimately delineates a  
 23 property interest, which is traditionally the province of state law. But because the  
 24 limitations issue is not complex and federal law issues are present, this factor is  
 25 likely neutral. *See Moses H. Cone Mem'l Hosp.*, 460 U.S. at 942 ("the presence of  
 26 federal-law issues must always be a major consideration weighing against  
 27

1 surrender"). *Cf. Seneca Ins. Co., Inc. v. Strange Land, Inc.*, 862 F.3d 835, 844 (9th  
 2 Cir. 2017) (finding where complexity in a state law case solely arises from the  
 3 number of parties or claims, the source of law factor is neutral (*citing R.R. St.*, 656  
 4 F.3d at 980–81)).

## 5       **6.      The Townsends are Adequately Protected in State Court**

6       The sixth *Colorado River* factor "concerns 'whether the state court might be  
 7 unable to enforce federal rights.'" *Montanore*, 867 F.3d at 1169 (quoting *Seneca*,  
 8 862 F.3d at 845). The sixth factor may weigh in favor of a stay "when it is clear  
 9 'that the state court has authority to address the rights and remedies at issue.  
 10 [H]owever, this factor is more important when it weighs [against a stay]." *Id.*  
 11 (citations omitted) (alterations in original). In this action, the Townsends assert  
 12 claims under the FDCPA and CPA. There is no doubt Washington courts have the  
 13 authority to hear these types of claims—they regularly do so. *Donohue v. Nielson*,  
 14 161 Wash. App. 606, 255 P.3d 760 (2011); *Leipheimer v. ReconTrust Co.*, 175  
 15 Wash. App. 1065 (2013); *Am. Exp. Centurion Bank v. Hengstler*, 186 Wash. App.  
 16 1035 (2015). The Townsends had the ability to bring their compulsory  
 17 counterclaims alleged in this case rather than in the state court foreclosure action  
 18 and as a matter of law should have done so. This factor weighs in favor of stay or  
 19 dismissal.

## 20       **7.      The Townsends' Forum Shopping Favors Stay or Dismissal**

21       "When evaluating forum shopping under *Colorado River*, [courts] consider  
 22 whether either party improperly sought more favorable rules in its choice of forum  
 23 or pursued suit in a new forum after facing setbacks in the original proceeding."  
 24 *Seneca Ins. Co.*, 862 F.3d at 846. The Townsends removed the state action only to  
 25 have it remanded in September 2019. After the state action was remanded, the  
 26 Townsends filed this action asserting both federal and state law claims relating to  
 27

1 the subject matter and conduct involved in the state action—rather than asserting  
 2 their claims as counterclaims in state court as required by CR 13(a). This evidences  
 3 the Townsends' preference for litigating in federal court and their desire to  
 4 improperly avoid application of CR 13(a) in the state suit.

#### 5       **8. Parallelism Favors Stay or Dismissal**

6       The final *Colorado River* factor assesses whether the state action will resolve  
 7 all issues before the federal court. *Montanore*, 867 F.3d at 1170. The factor looks  
 8 to "'whether the state court proceeding sufficiently parallels the federal proceeding'  
 9 in order 'to ensure comprehensive disposition of litigation.'" *Montanore*, 867 F.3d  
 10 at 1170 (*quoting R.R. St.*, 656 F.3d at 982) (internal quotation marks omitted).  
 11 "Exact parallelism" is not required. *Id.* "It is sufficient if the proceedings are  
 12 'substantially similar.'" *Id.* For example, the Court of Appeals for the Ninth Circuit  
 13 has found actions "sufficiently parallel because they concerned the same relevant  
 14 conduct and named the same pertinent parties . . . even though additional parties  
 15 were named in the state suit, the federal suit included additional claims, and the  
 16 suits arguably focused on different aspects of the dispute." *Montanore*, 867 F.3d  
 17 at 1170 (*citing Nakash v. Marciano*, 882 F.2d 1411, 1416–17 (9th Cir. 1989)).

18       The Pierce County Superior Court proceeding and this action concern the  
 19 same course of conduct regarding the loan and property; the Townsends' federal  
 20 court claims are expressly based on the viability of BoNYM's claims in the state  
 21 action. The same pertinent parties—the Townsends and BoNYM—are named in  
 22 both suits. In terms of parties, the federal action differs from the state action in just  
 23 two inconsequential ways: it omits parties BoNYM has already secured a default  
 24 judgment against and who are not implicated by the Townsends' allegations, and  
 25 the Townsends add BoNYM's servicer in an attempt to hold BoNYM responsible  
 26 for the same course of conduct they assert is unlawful in the state action. As framed  
 27

1 by the Townsends, both actions ultimately turn on BoNYM's ability to collect or  
2 foreclose. Both revolve on whether the statute of limitations bars recovery. The  
3 Townsends' claims in this suit are compulsory counterclaims in the state action,  
4 and the Townsends were required by law to raise them there. *See* CR 13(a);  
5 *Schoeman v. N.Y. Life Ins. Co.*, 106 Wn.2d 855, 863–64 (1986) (en banc). In short,  
6 the cases are inextricably tied. The state court could resolve all issues before the  
7 federal court, saving the judicial system's resources and the parties the burden of  
8 wastefully duplicative litigation.

9 **IV. PRAYER**

10 The *Colorado River* factors countenance federal deference to the parallel  
11 Pierce County Superior Court proceeding. BoNYM and Nationstar respectfully  
12 request the court stay or dismiss this action in the interest of wise judicial  
13 administration.

14 Submitted this 3<sup>rd</sup> day of August, 2020.

15  
16 **WITHERSPOON • KELLEY**

17 By: /s/ Daniel J. Gibbons

18 Daniel J. Gibbons, WSBA #33036

19 Steven J. Dixson, WSBA #38101

20 *Attorneys for Defendants the Bank New*  
*York Mellon, f/k/a the Bank of New*  
*York as Trustee for First Horizon*  
*Alternative Mortgage Securities Trust*  
*2006-AA6 and Nationstar Mortgage*  
*LLC d/b/a Mr. Cooper*

1  
2                   **CERTIFICATE OF SERVICE**  
3

4           1. I hereby certify that on the 3<sup>rd</sup> August, 2020, I caused to be electronically filed the  
5 foregoing SECOND MOTION TO DISMISS OR TO STAY PROCEEDINGS with the Clerk of  
6 the Court using the CM/ECF System which will send notification of such filing to the following:  
7

8           **Ha Thu Dao:** hadaojd@gmail.com, Admin@Barrazalaw.com,  
9                   youremylawyer@gmail.com, handlinda@gmail.com  
10

11           **Christina Latta Henry:** chenry@HDM-legal.com, mainline@hdm-legal.com,  
12                   HenryDeGraaffPS@jubileebk.net  
13

14           2. I hereby certify that I have mailed by United States Postal Service the foregoing  
15 document to the following non-CM/ECF participants at the address listed below: **None**.  
16

17           3. I hereby certify that I have mailed by United States Postal Service the document  
18 to the following CM/ECF participants at the address listed below: **None**.  
19

20           4. I hereby certify that I have hand-delivered the document to the following  
21 participants at the addresses listed below: **None**.  
22

23                   *s/ Daniel J. Gibbons*  
24

25                   Daniel J. Gibbons, WSBA # 33036  
26                   WITHERSPOON • KELLEY  
27                   422 W. Riverside Ave., Suite 1100  
DEFENDANTS' SECOND MOTION TO  
DISMISS OR TO STAY PROCEEDINGS - 12  
S2062432



WITHERSPOON•KELLEY  
Attorneys & Counselors

422 W. Riverside Avenue, Suite 1100  
Spokane, Washington 99201-0300

Phone: 509.624.5265  
Fax: 509.458.2728